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No. 90-952

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Appellants,

versus

CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

MOTION TO DISMISS OR AFFIRM

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No. 90-952

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October Term, 1990

JANICE G. CLARK, ORSCINI L. BEARD, EDDIE G. CRAWFORD, NORBERT C. RAYFORD, VOTER INFORMATION PROJECT, INC., LOUIS SCOTT, SYLVIA COOK, CONNIE SADLER, TOM NELSON AND ALBERT RICHARD,

Appellants,

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CHARLES "BUDDY" ROEMER, GOVERNOR OF LOUISIANA; WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF LOUISIANA; FOX McKEITHEN, SECRETARY OF STATE OF THE STATE OF LOUISIANA, IN THEIR OFFICIAL CAPACITIES AS REPRESENTATIVES OF THE STATE OF LOUISIANA,

Appellees.

On Appeal From The United States District Court For The Middle District Of Louisiana

MOTION TO DISMISS OR AFFIRM

This is a direct appeal from an Order, rendered and entered on October 22nd, 1990,[1] and an Opinion,

[1] *See* Appendix to Jurisdictional Statement [hereinafter "App."] 68a through 80a.

rendered and entered on October 31st, 1990,[2] by a district court of three judges, specifically constituted pursuant to 28 U.S.C. § 2284.

Appellees, pursuant to Rule 18.¶.6. of the Rules of the Supreme Court of the United States, move the Court to dismiss the appeal herein or, in the alternative, to affirm the final judgment and decree of the three-judge court on the ground that it is manifest that the questions on which this case depends are so unsubstantial as not to need any further argument.

STATEMENT OF THE CASE

This appeal involves questions under Section 5 of the Voting Rights Act. Because the same suit involves Section 2(b) of the Voting Rights Act and because most of the litigation thus far has involved that Section, the procedural history of this case requires an initial discussion of the Section 2(b) claims.

A. The Voting Rights Act Section 2(b) Claim

Appellants brought this lawsuit in 1986 in the United States District Court for the Middle District of Louisiana as a class action pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure. The class consisted of all black voters in the State of Louisiana. The action challenged the at-large voting system for the election of District, Family Court and Courts of Appeal judges as

[2] *See* App. 1a through 67a.

being in violation of the 1965 Voting Rights Act, as amended, because, allegedly, the use of an at-large system results in a denial or abridgment of the right to vote of appellants and all those similarly situated on account of race and color.

The district court ultimately held in August 1988, that the at-large judicial election system did violate Section 2 of the Voting Rights Act. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988). The district court enjoined judicial elections which were scheduled for Fall, 1988. This injunction was overturned by the United States Court of Appeals for the Fifth Circuit. *Clark v. Roemer*, 88-3626 (5th Cir. 1988 unreported). An Application for Stay to this Court was denied by Circuit Justice White. When the Application was resubmitted to Justice Marshall, he submitted it to the full Court, which once again denied the stay. *Clark v. Roemer*, 487 U.S. 1266, 109 S.Ct. 29, 101 L.Ed.2d 979 (1988).

In February, 1990, the district court held a remedy trial, ultimately ordering subdistricting in nine District Courts, the Family Court in East Baton Rouge Parish, and in a district of one Court of Appeal. The district court reversed its earlier decision and held that violations had not been proven in 54 districts.

On September 28, 1990, the Fifth Circuit rendered its *en banc* decision in the case of *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), holding that Section 2(b) of the Voting Rights Act does not apply to the judiciary. The district court in this case then granted a Rule 54(b) motion filed by appellees dismissing:

> plaintiffs' claim that "the at-large election scheme of electing Appeal, Family, and District Court judges in the State of Louisiana unlawfully dilutes black voting strength and results in the denial of plaintiffs' opportunity to participate equally in the electoral process and to elect judges of their choice, in violation of Section 2, of the Voting Rights Act, 42 U.S.C. 1973."

Clark v. Roemer, Order, October 19, 1990 (M.D. La. unreported). This decision was appealed by appellants to the Fifth Circuit and docketed under 90-3785. Appellants then filed a petition for a writ of certiorari, before judgment, to this Court. No. 90-898. This petition is pending.

B. The Voting Rights Act Section 5 Claim

The appellants also asserted in their Complaint and amendments thereto that certain Louisiana statutory provisions creating additional judgeships had not been precleared by the Justice Department pursuant to Section 5 of the Voting Rights Act. Although the lawsuit was filed in 1986, for four years the only action taken by appellants regarding the Section 5 claims was to convene a three-judge court, which action occurred two years after filing of the Complaint.[3] In July, 1990, four years after filing of the Complaint, the appellants moved to submit the Section 5 claims to a three-judge court. The court was

[3] At that time the three-judge court enjoined five pending judicial elections provided for under Louisiana Acts 1987, No. 801. Three of those judgeships continue to be subject to that injunction.

composed of Circuit Judge Davis, Chief Judge Parker,[4] and Judge Polozola.

Well over fifty pleadings and copious memoranda were submitted to the three-judge court. On October 22, 1990, the three-judge court held its second of two hearings concerning whether to halt the pending 1990 judicial elections. In an order issued that day, October 22, 1990, App. 68a, and in an opinion issued October 31, 1990, the three-judge court ruled that the elections would go forward, App. 1a.

The order and opinion addressed elections to be held under four different categories of statutes. First, elections for judgeships previously precleared or which did not require preclearance would take place. Opinion of the Three-Judge Court (October 31, 1990), App. 12a-13a. Second, the three-judge court held that a number of statutes creating judicial positions had been precleared, ruling "that when 'the Attorney General cleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in the district.' " Opinion of the Three-Judge Court (October 31, 1990), App. 13a. Third, the three-judge court allowed elections to proceed for certain other judgeships which had not been precleared but for which the three-judge court had allowed qualifying and campaigning. Opinion of the Three-Judge Court (October 31, 1990), App. 14a-15a. Judges elected to these

[4] Chief Judge Parker has presided over the district court proceeding during the entire history of this case, including two lengthy trials.

positions would serve provisionally pending further orders of the three-judge court. Opinion of the Three-Judge Court (October 31, 1990), App. 15a-16a. Finally, the three-judge court enjoined certain other elections for which the three-judge court had not permitted qualifying to reopen since the qualification had originally occurred more than two years before. Opinion of the Three-Judge Court (October 31, 1990), App. 17a n. 24. The three-judge court held that within ninety days the State of Louisiana must either obtain preclearance of the unprecleared judgeships or file a declaratory action with the United States District Court for the District of Columbia under the provisions of 28 U.S.C. § 1973c, failing which the judges provisionally elected would be automatically removed from office. Opinion of the Three-Judge Court (October 31, 1990), App. 16a-17a.

On October 29, 1990, appellants filed an application for injunction pending appeal to this Court. On November 2, 1990, this Court enjoined the elections which, the three-judge court held, had not been precleared. *Clark v. Roemer*, 59 U.S.L.W. 3361 (U.S. Nov. 13, 1990). The injunction was conditioned upon timely filing of a jurisdictional statement in this Court. This Court refused to overturn the three-judge court's order holding that approval of later statutes increasing the number of judges necessarily precleared earlier statutes that involved the number of judges. This Court also refused to remove the judges who were either elected on October 6, 1990, or who had not drawn opposition for the October 6, 1990 election.

ARGUMENT

I. WHETHER THE THREE-JUDGE COURT ERRED IN PERMITTING ELECTIONS TO GO FORWARD UNDER UNPRECLEARED STATUTES IS NOW MOOT.

Appellants first argue that the three-judge court erred in allowing November 6 and December 8, 1990 elections to be scheduled for positions which the three-judge court held had not been precleared. Appellees believe that the three-judge court correctly balanced the "interest of state and local authorities in managing their own affairs consistent with the Constitution" with the voting rights of the appellants. *See Spallone v. United States*, 493 U.S. ___, ___, 100 S.Ct. 625, 107 L.Ed.2d 644, 655 (1990), *quoting Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 53 L.Ed.2d 745, 756 (1977). Ample precedent for allowing the elections to take place existed under such precedents as *Brooks v. State Board of Elections*, No. CV 288-146, 1989 W.L. 180759 (S.D. Ga. Dec. 1, 1989), *modified*, (S.D. Ga. May 29 and June 25, 1990) (three-judge court), *aff'd mem.*, Nos. 90-272 & 90-332, 59 U.S.L.W. 3293 (U.S. Oct. 15, 1990); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 167, 105 S.Ct. 1128, 84 L.Ed.2d 124 (1985); *Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978); *United States v. County Commission, Hale County, Alabama*, 425 F. Supp. 433 (S.D. Ala. 1977), *aff'd mem.*, 430 U.S. 924, 97 S.Ct. 1540, 51 L.Ed.2d 768 (1977); *Georgia v. United States*, 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973); *Scaggs v. Larsen*, 396 U.S. 1206, 90 S.Ct. 5, 24 L.Ed.2d 28 (1969); *Moore v. Leflore County Board of Election Commissioners*, 351 F. Supp. 848 (N.D. Miss.

1971); *Wilson v. North Carolina State Board of Elections*, 317 F. Supp. 1299 (M.D.N.C. 1970).

Despite such precedents, this Court enjoined the November 6 and December 8, 1990 elections for these unprecleared judgeships. Both dates have now passed without the elections taking place. Louisiana will be timely filing a declaratory action with the United States District Court for the District of Columbia under the provisions of 28 U.S.C. § 1973c. Consequently, although the State of Louisiana disagrees with this Court's reversal of the three-judge court order allowing these elections in the Fall of last year, the question is now moot.

II. THE THREE-JUDGE COURT CORRECTLY RULED THAT PRECLEARANCE OF STATUTES CREATING AN ULTIMATE NUMBER OF JUDICIAL SEATS IN A PARTICULAR JUDICIAL DISTRICT CONSTITUTES PRECLEARANCE OF ALL JUDICIAL SEATS NECESSARY TO REACH THAT ULTIMATE NUMBER.

The three-judge court correctly concluded that a number of additional judgeships were precleared because the Justice Department had precleared statutes for an ultimate number of judges that necessarily included those additional judgeships. An example of this situation is Caddo Parish, the First Judicial District, where the following pattern occurred:

DIVISION	ADDED	PRECLEARANCE REQUESTED[5]	GRANTED[6]	DENIED[7]
A		NO		
B		NO		
C		NO		
D		NO		
E	Act 2 of 1966	YES	8/18/86	
F	Act 117 of 1973	YES		9/23/88
G	Act 46 of 1976	YES	8/11/76	
H	Act 39 of 1978	YES	9/20/78	
I	Act 21 of 1982	YES	12/2/82	

The three-judge court deemed it nonsensical that adding Judge No. 5 ("E") to the first four judges was permissible, and likewise adding Judges No. 7, No. 8, and No. 9 ("G, H, and I") to the existing judgeships was permissible, but that somehow adding Judge 6 (Division "F") to Judges 1, 2, 3, 4 and 5 was objectionable. The three-judge court held as follows:

> We find that when the Attorney General precleared statutes creating an ultimate number of judicial seats in a particular judicial district, that preclearance constituted approval of all judicial seats necessary to reach the ultimate number of judicial positions in that district. . . . We reach this conclusion because each of the Acts of the legislature

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[5] Acts 1956, Ex. Sess. No. 7, § 1, in amending former R.S. 13:621, provided that the First Judicial District should have four judges. This Act thus predated the 1965 Voting Rights Act.

[6] The preclearance letters by the U.S. Department of Justice are reproduced and as such appear in the Appendix to this Motion pages 1 through 7.

[7] This letter is reproduced beginning at App. 108a.

which added a new division in Caddo Parish provided that the Act increased the number of judges in the district from an existing number to a new number. When the Attorney General precleared seven judicial positions in Caddo Parish at the time Division G was added, he thereby expressly approved the first six positions, which included Division F. Contrary to plaintiffs' argument, we find that there was express approval by the Attorney General for those judicial positions set forth in Part I of our October 22, 1990, order. The language of the various acts submitted to the Attorney General, as well as the letters submitted by the State of Louisiana seeking preclearance, support this conclusion. Thus, the change submitted to the Attorney General is not only the amendment, but the entire act as passed by the legislature. When the Attorney General approves the new act, he not only approves the amended portion but necessarily approves the older, reenacted part, which forms part of the new act. Thus, when an act provides for a certain number of judicial positions, approval of that act must include all of the judicial positions necessary to reach that number.

In determining whether the preclearance sought by the State of Louisiana was proper within the meaning of Section 5 of the Voting Rights Act of 1965, the Court must determine whether the submission was in an "unambiguous and recordable manner" and whether the submission was "in fact evaluated" by the Attorney General. The Court finds that the evidence presented in this case does show that the submissions were made to the Attorney General in an unambiguous manner, and he approved the various increases in the number of judges to be added to each of the districts set forth in Part I of our October 22 order.

Opinion of the Three-Judge Court (October 31, 1990), App. 24a – 29a.

The inconsistencies in the approach by the Justice Department were not limited to the First Judicial District. Other examples are listed below:

> Sixteenth Judicial District – After approving and preclearing judgeships for Divisions "E", created in 1977, the Justice Department objected to a judgeship for Division "D" 13 years earlier.
>
> Twenty-First Judicial District – After approving and preclearing a judgeship for Division "E", the Justice Department objected to a judgeship created for Division "D" 16 years earlier.
>
> Twenty-Third Judicial District – After approving and preclearing a judgeship for Division "D", the Justice Department objected to a judgeship created for Division "C" 22 years earlier.
>
> Twenty-Seventh Judicial District – After approving and preclearing a judgeship for Division "D", the Justice Department objected to a judgeship created for Division "C" 19 years earlier.
>
> Twenty-Ninth Judicial District – After approving and preclearing a judgeship for Divisions "D" and "E", the Justice Department objected to a judgeship created for Division "C" 20 years earlier.
>
> Thirty-Ninth Judicial District – After approving a Special Election for a judge, the Justice Department objected 11 years later to the boundaries within which this judge was to sit.

After considering these and many other anomalies, and after reviewing the Louisiana statutes and the

submission letters, the three-judge court concluded that all of these seats had been precleared.[8]

The eminent good sense of the three-judge court's decision is demonstrated by the absurdity of the alternative. Take for example the Twenty-Third Judicial District. Judgeships "A" and "B" predated the Voting Rights Act of 1965, so that no preclearance was required. Judgeship "C" was added by Acts 1968, No. 464. Preclearance was not sought until 1988, at which time preclearance was rejected. Letter of September 23, 1988, Appendix 108a. Judgeship "D" was added by Acts 1982, No. 21, for which preclearance was sought and was received on December 2, 1982. If the Justice Department is right, there cannot be four judges in the Twenty-Third Judicial District because preclearance of the third judge never occurred. Additionally, arguably there cannot be three judges in the

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[8] Significantly, substantially all of the latest Acts were submitted to and approved by the Justice Department. However, after the filing of this litigation, the Justice Department reversed its attitude and policies, and in doing so, refused to preclear any new statutes and refused to preclear Acts passed as long as 20 years ago. In its October 31, 1990 Opinion, the Three-Judge Court stated:

> The evidence submitted by the parties indicates that the Attorney General approved the method Louisiana used for adding judges approximately 81 times. Preclearance was denied on only three dates: September 23, 1988; May 12, 1989; and September 17, 1990. These denials came after Judge Parker had rendered his decision in the Section 2 case on August 15, 1988.

Opinion of the Three-Judge Court (October 31, 1990), App. 29a n. 41.

Twenty-Third Judicial District because the Justice Department has refused to preclear having three judges in the Twenty-Third Judicial District. Thus, there can only be two judges in the Twenty-Third Judicial District, one-half the number which Louisiana needs.[9]

The appellants cite *McCain v. Lybrand*, 465 U.S. 236, 104 S.Ct. 1037, 79 L.Ed.2d 271 (1984), for the proposition that preclearance of subsequent additional judgeships does not constitute preclearance of an earlier additional judgeship.[10] *McCain*, however, is inapplicable because

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[9] Indeed, according to the Justice Department's "logic," arguably the answer is that there can be *no* judges in the Twenty-Third Judicial District. As the Justice Department approved having four judges in that district, having only two judges would be a change from what has been precleared, which change would itself require preclearance. Given that the Justice Department has refused for the past two years to preclear *any* additional judgeship in Louisiana unless the district involved is majority black (such as Orleans) or unless a black happens to win the seat involved, *see* pages 19-20 *infra*, presumably the Justice Department would not preclear having one or two judges in that district, so there would be *no* judges in the Twenty-Third Judicial District.

[10] Appellants also cite this Court's summary affirmance of *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem. Martin v. Haith*, 477 U.S. 901, 106 S.Ct. 3268, 91 L.Ed.2d 559 (1986). Of course, a summary affirmance is "not of the same precedential value as would be an opinion of the court treating the question on the merits." *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 39 L.Ed.2d 662, 677 (1974); *accord, Tully v. Griffin*, 429 U.S. 68, 74, 97 S.Ct. 219, 50 L.Ed.2d 227, 233 (1976); *Richardson v. Ramirez*, 418 U.S. 24, 83 n. 27, 94 S.Ct. 2655, 41 L.Ed.2d 551, 587 n. 27 (1974) (Marshall, Douglas, & Brennan, J., dissenting). This Court in *Haith* never addressed

(Continued on following page)

there the earlier, unprecleared change involved a radical alteration of the type of government in a particular county, while the later, precleared change involved an increase in the number of members in the governing body. The South Carolina General Assembly had enacted a 1966 act, totally revising Edgefield County's system of government. 465 U.S. at 239, 104 S.Ct. 1037, 79 L.Ed.2d at 275. The act combined legislative and administrative powers in a brand-new council. Although the council members were required to reside in a particular district, they were elected at-large. The act also provided for two year terms and set forth the method of electing the council chairman. The 1966 act was never precleared. In 1971 the General Assembly passed a new act to increase the number of council members and districts, necessitating new district boundaries. 465 U.S. at 240, 104 S.Ct. 1037, 79 L.Ed.2d at 276. This act was precleared. 465 U.S. at 241, 104 S.Ct. 1037, 79 L.Ed.2d at 276. This Court held that preclearance of the later act did not constitute preclearance of the former act. The Attorney General was

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(Continued from previous page)

the argument relied on by the three-judge court in the instant case. Indeed, this argument is never mentioned in the three-judge court opinion in *Haith*. Finally, it should be noted that the three-judge court in the instant case based its decision on a careful analysis of the various acts in question and of the preclearance submission letters sent by the State of Louisiana to the Attorney General. Opinion of the Three-Judge Court (October 31, 1990), App. at 26a – 27a. For that reason the three-judge court concluded "[i]t cannot be said that the submission by the State of Louisiana was ambiguous concerning the scope of the request." Opinion of the Three-Judge Court (October 31, 1990), App. at 26a n. 38.

focusing on the change in boundaries and in the number of seats, not on the dramatic systemic change in the type of government made by the 1966 act. 465 U.S. at 252, 104 S.Ct. 1037, 79 L.Ed.2d at 283. While in *McCain* the unprecleared act in question created a completely new form of government, here the unprecleared acts merely provided for additional judgeships and stated that the total number of judgeships would be the increased number. Any Louisiana statute submitted to the Justice Department necessarily showed the effect of the new judgeship and provided for the total number of judgeships in the judicial district, and the preclearance of the later statute of necessity precleared the earlier added seat.

Appellants, at pages 6-7 of their Jurisdictional Statement, attempt to reurge their Motion before the three-judge court for reconsideration and clarification of the October 22nd Order. For the following reasons given by the three-judge court in its October 31st Opinion, the Motion was denied:

> **IV. PLAINTIFFS' MOTION FOR RECONSIDERATION AND CLARIFICATION**
>
> The plaintiffs have filed a motion seeking to have the Court reconsider its October 22 order insofar as it applies to certain judgeships set forth in Part I of the Court's order. In Part I of the order of October 22, the Court set forth those judicial positions which the Court found to have been precleared by the Attorney General. Specifically, plaintiffs ask the Court to review its decision on the following judicial positions: 10th District, Divisions A and B, and 39th District, Division A; all judgeships in the

First Circuit Court of Appeal; and the at-large judgeships in the Second and Third Circuits.[73]

– – – –

[73] Plaintiffs also contend that this Court precleared judgeships in the 17th and 32nd judicial districts even though there were no Section 5 objections made on those two districts. Whether there is an objection filed or not, the Court's decision that these judicial positions have been precleared by the Attorney General is correct.

The Court has again reviewed the record and finds that its decision which held that the judicial positions set forth in Part I of its October 22 order have been precleared by the Attorney General is correct for the reasons previously cited in this opinion. We also find that the Attorney General specifically precleared the division of the 10th and 39th Judicial Districts into two separate districts when he approved judicial positions for both districts. Finally, we conclude that when the Attorney General precleared Act 3 of the 1981 Louisiana Legislature on August 26, 1981, he expressly precleared the number of judges and divisions for each of the circuits.[74]

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[74] The state's six page letter of July 29, 1981, to the Attorney General explained in detail the changes made by Act 3 of 1981. On page 4 of the letter, it is stated: "*Prior law* provided for alphabetical divisions (A, B, C, . . .) within each district of the First Circuit. *New law* provides the same for all court of appeal circuits." (emphasis in original).[11]

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[11] This six page letter dated July 29, 1981 to the U.S. Department of Justice and the August 26, 1981 response thereto by the U.S. Department of Justice are reproduced and appear in the Appendix to this Motion pages 8 through 19.

> The Court on its own motion does find that one judicial position which the Court initially found to be unprecleared has in fact been expressly precleared by the Attorney General. This district is District 20, Division B. Exhibit D-4, which was filed in the record, clearly shows that the split of District 20 into two parishes and the creation of Division B was expressly submitted and approved by the Attorney General. Therefore, the Court hereby amends its October 22 order to delete District 20, Division B from the unprecleared list in Part II of the order. The Court orders this judicial position to be included in Part I of the October 22 order which sets forth precleared judicial positions.

Opinion of the Three-Judge Court (October 31, 1990), App. 50a through 53a.

Appellants also contend that subsequent preclearance in this case is improper because of the possibility of an earlier "stated discriminatory purpose" in one of the prior Louisiana statutes. Of course, here there are no pleadings or evidence in this Section 5 case of any stated discriminatory purpose in the addition of much-needed judgeships in the State of Louisiana. Indeed, the Justice Department has admitted that its objection is "not to the number of judges *per se*", Letter of October 6, 1990, App. 169a, and that it does not question the State of Louisiana's "need for or purpose in creating new judgeship positions." Letter of September 17, 1990, App. 168a.

Instead, the Justice Department has announced that it is opposed to Louisiana's at-large system of electing judges, a system in effect since 1946, *see* LA. R.S. 13:582-585, predating by two decades the Voting Rights Act of 1965. *See Beer v. United States*, 425 U.S. 130, 139, 96

S.Ct. 1357, 47 L.Ed.2d 629, 638 (1976). The Justice Department has been dragging its feet on preclearance requests because it wants to uproot and destroy the entire Louisiana judicial election system, replacing it with another "system" such as limited voting.[12] Letter of September 17, 1990, App. 158a.[13] The Justice Department's heavy-handed action in refusing to preclear additional judgeships so as to attempt to force Louisiana to change its "system" of electing judges ignores the decision in this case that the Louisiana "system" of electing judges cannot violate Section 2 of the Voting Rights Act, ignores the holding in *Thornburg v. Gingles*, 478 U.S. 30, 56, 106 S.Ct. 2752, 92 L.Ed.2d 25, 50 (1986), that any remedy under Section 2 must be district-specific and not systemic,

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[12] Under limited voting a voter can only vote for some of the positions on the ballot. Such a system would itself appear to violate the Voting Rights Act. 42 U.S.C. § 1973n. Limited voting was rejected as a judicial remedy in Voting Rights Act cases, including *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). Judge Parker rejected it as a remedy in this case, after hearing uncontested testimony that it exists in only approximately 200 of the more than 86,000 local governmental units in this country.

[13] The Justice Department cited as authority Judge Parker's statement in his opinion on liability that the solution was to "revise the [judicial election] system – to cast about for alternative procedures under which black voters would have a better chance to elect judicial candidates of their choice." *Clark v. Edwards*, 725 F. Supp. 285, 303 (M.D. La. 1988). Judge Parker reversed himself after the remedy trial, holding that the court "lacks the power to impose a systemic remedy upon the state and that any remedy is indeed limited to the 'guilty' districts." *Clark v. Roemer*, ___ F. Supp. ___ (M.D. La. 1990), not yet reported.

ignores the Fifth Circuit's decision in *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), and violates the Justice Department's internal rule requiring that preclearance determinations be guided by relevant federal judicial decisions. *See* 28 C.F.R. ch. 1 (7-1-89 Edition) § 5.56.

Indeed, if there is any "discriminatory purpose" in this case, it is the "discriminatory purpose" evidenced by the Justice Department in its preclearance decisions involving Louisiana judgeships.[14] In two letters dated the same day the Justice Department stated that portions of Act 8 of 1990 adding judgeships would not be precleared, but other portions of the same statute adding judgeships were precleared. *Compare* Letter of September 17, 1990, App. 142a, 160a, 166a *with* Letter of September 17, 1990, App. 136a. Even stranger is the case of the Sixth Judicial District. In September 1990 the Justice Department refused to preclear an additional judgeship for that judicial district. Letter of September 17, 1990, App. 163a. When an election was held in that district on October 6,

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[14] Appellees filed in the three-judge court a motion challenging the constitutionality of the Justice Department's application of Section 5 to these Louisiana judgeships. The motion states that the Justice Department has precleared every judicial act of Alabama and Texas, while refusing to preclear Louisiana's judicial acts, even though the judicial election systems in the three states are precisely the same: i.e., at-large, designated post, majority vote. On January 10, 1990, Appellees moved that this motion be transferred to the United States District Court for the District of Columbia, pursuant to 28 U.S.C. §§ 1404, 1406, and 1631, as that Court will be hearing the declaratory judgment action concerning preclearance of these Louisiana judgeships.

1990, pursuant to the three-judge court order, a black happened to win the election. Thereafter, on November 20, 1990, the Justice Department precleared the previously unapprovable seat *even though no request for preclearance of that seat was pending*. Letter of November 20, 1990, (included herein as App. 20).

The judgeship involved in the Sixth Circuit was for the Section B judicial position. This judgeship was authorized by Acts 1974, No. 515. This Act contained precisely the same language as that of all other acts of the Legislature creating judgeship positions, i.e. "the (number) judicial district shall have (number) judges." This Act is reproduced, and as such included herein, as App. 22-26. It is difficult to perceive how an individual could serve in this unprecleared judgeship seat for 15 or 16 years, yet the successor in office immediately serves in what is now a precleared judgeship seat. Their constitutional powers were the same — while sitting as a district court they each had exclusive original jurisdiction of all civil and criminal matters. They had exclusive original jurisdiction of felony cases and of cases involving title to immovable property; the right to office or other public position; civil or political rights; probate and succession matters; the state, a political corporation, or political subdivisions, or a succession, as a defendant; and the appointment of receivers or liquidators for corporations or partnerships. Constitution of Louisiana 1974 Art. 5, § 16.

Clearly, the Justice Department does not believe that the addition of vitally needed judgeships in a multi-member judicial district is discriminatory. Instead, the Justice Department disagrees with the Louisiana at-large

system of electing judges (even though the system existed for two decades before the Voting Rights Act of 1965) except, of course, where the at-large system happens to result in the election of minority judges.

Given the absence of any discriminatory purpose and given that a statute providing for eleven judges in a judicial district necessarily means that there are one-two-three-four-five-six-seven-eight-nine-ten-eleven judges in that district,[15] the three-judge court correctly concluded that the statutes at issue had been precleared.

III. JUDGES WHO HAVE BEEN ELECTED SHOULD NOT BE THROWN OUT OF OFFICE

Finally, appellants finally argue that judges who were unopposed and elected or who won in elections held on October 6, 1990, should be thrown out of office. The appellants never sought an injunction to prevent these elections from occurring and should not now be able to retroactively invalidate these elections. Nor have

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[15] For example, Acts 1978, No. 39, amended LA. R.S. 13:621.15 to increase judges in the Fifteenth Judicial District from 6 to 7, and this was precleared on September 20, 1978. Acts 1982, No. 21, amended LA. R.S. 13:621.15 to increase judges in the Fifteenth Judicial District from 9 to 10, and was precleared on December 2, 1982. Acts 1983, No. 226, amended LA. R.S. 13:621.15 to increase judges in the Fifteenth Judicial District from 10 to 11 and this was precleared on October 7, 1983. Yet, after preclearing the change from 6 judges to 7 judges; preclearing the change from 9 judges to 10 judges; and preclearing the change from 10 judges to 11 judges; the Justice Department objected to earlier increases from 4 judges to 5 judges; 5 judges to 6 judges; and 7 judges to 9 judges.

appellants sought relief in the three-judge court as to these judgeships.

This Court in the past has refused to set aside elections held under statutes that had not been precleared, holding that "[i]n certain circumstances . . . it might be appropriate to enter an order affording local officials an opportunity to seek federal approval and ordering a new election only if local officials fail to do so or if the required federal approval is not forthcoming." *Perkins v. Matthews*, 400 U.S. 379, 396-97, 91 S.Ct. 431, 27 L.Ed.2d 476, 489-90, (1971); *accord, Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978); *Allen v. Board of Elections*, 393 U.S. 544, 571-72, 89 S.Ct. 817, 22 L.Ed.2d 1, 20-21 (1969).[16]

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[16] One of the factors to be considered in determining whether to invalidate elections is "whether it was reasonably clear at the time of the election that the changes were covered by § 5." *Perkins v. Matthews*, 400 U.S. 379, 396, 91 S.Ct. 431, 27 L.Ed.2d 476, 489 (1971). The United States Court of Appeals for the Fifth Circuit has stated that § 2 of the Voting Rights Act does not apply to the judiciary. *League of United Latin American Citizens Council # 4434 v. Clements, et al.*, 914 F.2d 620 (5th Cir. 1990) (*en banc*). The three-judge court held in this case that § 5 of the Voting Rights Act is applicable to certain additional judgeships, but that pending elections for those judgeships should nevertheless go forward. This Court, however, enjoined such elections. The three-judge court in *Hunter v. City of Monroe*, Docket 90-2031 (W.D. La. November 7, 1990, unreported) (three-judge court) held that § 5 of the Voting Rights Act does not apply to the "addition of more judges, to be elected by the same voters who elect the present judges." Opinion of Three-Judge Court, November 7, 1990. *Id.* Slip Opinion p. 3. This Court refused to grant a request by the petitioners in that case to prevent the elected judges from taking their seats. *Hunter v. McKeithen*, (A-363) 59 L.W. 3291 (Nov. 26, 1990). "Given these varying decisions, it cannot be said that the law in this area is "reasonably clear."

In *Berry v. Doles*, 438 U.S. 190, 98 S.Ct. 2692, 57 L.Ed.2d 693 (1978), an action was filed in a three-judge court shortly before a primary election to enforce the requirements of § 5 and to prevent the pending election. The requests for declaratory and injunctive relief were not acted upon until after the scheduled primary election and the subsequent run-off election. The three-judge court afforded prospective relief only by enjoining further enforcement of the statute but did not set aside the results of the elections. On appeal, this Court refused to void the elections, holding:

> We conclude that the requirement of federal scrutiny imposed by § 5 should be satisfied by appellees without further delay. Accordingly, we adopt the suggestion of the United States that the District Court should enter an order allowing appellees 30 days within which to apply for approval of the 1968 voting change under § 5. If approval is obtained, the matter will be at an end. If approval is denied, appellants are free to renew to the District Court their request for simultaneous election of all members of the Board at the 1978 general election.

438 U.S. at 192-93, 98 S.Ct. 2692, 57 L.Ed.2d 693, 696.

Even more recently, in October, 1990, a three-judge court refused to enjoin plaintiffs' request to enjoin a City Court election in Monroe, Louisiana, based on the failure to obtain preclearance. Docket 90-2031 (W.D. La. November 7, 1990, unreported) (three-judge court). The plaintiffs in that case did not appeal the denial of the injunction to this Court. Instead, two weeks after the election, they filed a Motion for Reconsideration, Certification, and Comprehensive Relief. The three-judge court allowed certification of the winners. Thereafter, the plaintiffs filed an

Application for Stay and Injunction Pending Appeal with this Court, which application sought to prevent the elected judges from taking their seats. No. A-363. Circuit Justice Scalia turned the application over to the entire Court, which denied the request 7-2. *Hunter v. McKeithen*, (A-363) 59 L.W. 3291 (Nov. 26, 1990).

Appellees submit that the decision by this Court in *Hunter* is applicable here. Indeed, the argument against throwing these judges out of office is even stronger because (a) unlike *Hunter*, no injunctive relief was sought in this case until after the election had occurred, and (b) unlike *Hunter*, these judges have already been seated and are acting on a heavy docket of cases.

Counsel for appellants admitted in a hearing in this case before Judge Parker on December 20, 1990, that the *Hunter* precedent governs the judges sought to be unseated here. During that same hearing, counsel for the appellants stated that he would not be seeking in that court to unseat these judges:

> MR. McDUFF: Now, in all candor, with respect to the first category of judgeships that were elected either in July without opposition or on October 6th, the Supreme Court did not specifically enjoin them from taking office in its injunction. And in the *Hunter* case which was a case coming out of Monroe City Court which we asked the Supreme Court to enjoin people from taking office after they had been elected because the timing was such that an application was not made to the Supreme Court for election, and they turned us down on a seven to two vote.
>
> So, to me that means that the Supreme Court did not specifically, in this case, enjoin the people elected in July through qualification or October 6th from taking office. So we are not going to take the position in this court that they should be kept from taking office. We do think, of course, it is still an unprecleared judgeship and that eventually something further is going to happen with it.

Transcript of Hearing in *Clark v. Roemer*, December 20, 1988, page 11, lines 22-25, page 12, lines 1-13.

Appellees note that the United States Attorney General has taken the position that these judges should be permitted to take office on a provisional basis. These same appellants sought on December 27, 1990, in the district court to enjoin certain incumbent Louisiana state district judges from serving in office past January 1, 1991, thus attempting to deprive the State of Louisiana of some of its existing judgeships. In the Response of the United States to Plaintiffs' Motion to Prevent Certain Persons From Holding Over in Office, filed on January 4, 1991, the United States Attorney General argued against throwing these judges out of office, stating:

> Movants here have not pointed to any reason why those incumbent judges elected prior to the 1990 election cycle should be treated differently from those judges elected as a result of the October 1990 elections and who will be permitted to take office on a provisional basis consistent with this Court's prior orders.

On January 11, 1991, the three-judge court agreed with this analysis by the United States Attorney General, and, in so doing, issued the following Amended Order:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

JANICE CLARK, ET AL

VERSUS CIVIL ACTION

CHARLES E. ROEMER, ET AL NO. 86-435-A

AMENDED ORDER

The court has pending before it a motion on behalf of plaintiffs to prevent certain state judges from continuing in office and to prevent the state from otherwise filling those offices. The state judgeships involved are among those the creation of which have not been "precleared" by the Attorney General of the United States as required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1965, 42 U.S.C. § 1973c, and they are listed in Part II of this court's order dated October 22, 1990. The specific judgeships which are the object of the motion are Division G of the Fourth Judicial District, Morehouse and Ouachita Parishes, and Divisions E, F and G of the Fourteenth Judicial District, Calcasieu Parish.

The court's order of October 22, 1990 scheduled elections for those judgeships (among others) for November 6, 1990 and if runoffs were required, for December 8, 1990 and the order authorized those persons elected to take office and serve provisionally as is set forth in Part III of the order. The Supreme Court, by its orders of November 2 and 5, 1990, set aside that portion of this court's order which authorized elections for judgeships which have not been precleared and enjoined the state officials from conducting those elections.

Because the scheduled elections were enjoined, no person was elected to any of those

judgeships and plaintiffs seek to enjoin the state from allowing those offices to be filled until the state has complied with the provisions of Section 5.

At present three of those offices are filled by incumbent judges whose terms expired on December 31, 1990. The other position has been filled by appointment by the Supreme Court of Louisiana under state law.

While the October 22, 1990 order may not authorize provisional filling of these specific judgeships, the spirit of the order is to avoid disruption of Louisiana's judiciary to the extent possible until the preclearance issues are finally resolved. All of these judgeships were created and filled years ago. While one does not have an incumbent because of the retirement of the incumbent, each is an integral part of Louisiana's existing judicial system. Their loss would impinge upon that system.

While the State defendants have not moved for amendment of the earlier order, the court sua sponte will amend it.

Accordingly, IT IS ORDERED that the order of October 22, 1990 is hereby amended so as to allow Division G of the Fourth Judicial District and Divisions E, F and G of the Fourteenth Judicial District to be provisionally filled in accordance with and under the terms and restrictions of Part III of that order.

Baton Rouge, Louisiana, January 11, 1991.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT
JUDGE

/s/ John V. Parker
JOHN V. PARKER
UNITED STATES DISTRICT
JUDGE

/s/ Frank J. Polozola
FRANK J. POLOZOLA
UNITED STATES DISTRICT
JUDGE

Appellants conclude their Jurisdictional Statement by stating, "In the meantime, of course, the State of Louisiana remains free to pass and preclear legislation that would cause these judges to be elected in a manner that satisfies Section 5." Presumably, by this, appellants mean that the State of Louisiana should adopt a new system of electing judges, such as limited voting. The problems with limited voting have been previously discussed in this motion.[17] Further, most of the unprecleared judgeships involve one seat in a district, and there is no way to have limited voting for one judgeship. Under limited voting, voters vote for some but not all of the positions to be filled. Where there is only one position to fill, there is no way to limit the voting population. Single judgeships are single offices, and the Voting Rights Act has been held not to apply to single office holders. *See Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986); *League of Latin American Citizens Council #4434 v. William P. Clements, et al.*, 914 F.2d 620, 645 (5th Cir. 1990) (*en banc*) (Higginbotham, J., concurring).

CONCLUSION

Louisiana has embraced, by direct will of its people as reflected through the framing and adoption of its

[17] *See* footnote 12 *supra*.

Constitutions, an electoral judicial system during 135 of its 179 year history, which includes a period of time in excess of all of this century and over a third of the last century.

Louisiana, unlike most of the 42 other states with an electoral judicial section, or retention system, may not freely make adjustments to Louisiana's judicial system without advance approval from Washington. In days gone past, such approval was never unreasonably withheld. On 81 such previous occasions, as found by the three-judge court [*see* page 12, fn. 8 *supra*] approval of a Louisiana legislative act was virtually automatic. From the day [August 15, 1988] Chief Judge Parker spoke of a systemic remedy [as subsequently recanted by Chief Judge Parker], the Justice Department of the United States has drawn a line in the sand, and, in so doing, has insisted on Louisiana adopting either a limited voting scheme or a cumulative voting scheme. As previously reflected [page 19 fn. 14 *supra*] Louisiana firmly believes that Section 5 is unconstitutional as currently applied by the Justice Department of the United States. This and many other issues, including the proper relationship between Sections 2 and 5 of the Voting Rights Act, are not presented in this case.

Until these difficult questions have been entertained and considered by the district court in the District of Columbia (as will occur in this case under the Three-Judge Court Order of October 22, 1990) and there is available to this Court a fully developed record, the present consideration of Section 5 is unwise and premature. Appellees, therefore, urge this Court to dismiss this appeal or, in the alternative, to affirm the decision of the three-judge court below.

All of the above and foregoing is thus respectfully submitted.

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APPENDIX

SEAL U.S. Department of Justice

WBR:SSC:DHH:jmc:gmh
DJ 166-012-3
P8184-8187
P8735
P8994-9002

Washington, D.C. 20530

August 18, 1986

L. Adrienne Dupont, Esq.
Staff Attorney
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804-9005

Dear Ms. Dupont:

This is in reference to four acts of the Louisiana Legislature creating judgeships (Act No. 3 (1965) – District 9, Division C; District 19, Division F; District 21, Division C; District 24, Divisions F and G; Act No. 2 (1966) – District 1, Division E; District 15, Division D; District 19, Division G; Civil District Court, Orleans Parish, Division I; Act No. 216 (1970) – District 19, Divisions H, I, and J; and Act No. 5 (1972) – District 19, Division K) and to the procedures for conducting the September 27, 1986, special election and the November 4, 1986, runoff election to fill a vacancy for a judgeship (District 19, Division H), submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission of the additional judgeships on July 23, 1986, and your submission of the special elections on July 28, 1986. In accordance with your request, expedited consideration has been given this submission pursuant to the Procedures for the Administration of Section 5 (28 C.F.R. 51.32).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. In addition, as authorized by Section 5, the Attorney General reserves the right to reexamine this submission if additional information that would otherwise require an objection comes to his attention during the remainder of the sixty-day review period. See also 28 C.F.R. 51.42 and 51.48.

Because these submissions are related to matters before the court in *Clark v. Edwards*, C.A. No. 86-435 Sec. A (M.D. La.), we are taking the liberty of sending a copy of this letter to the court.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Sandra Coleman
for Gerald W. Jones
Chief, Voting Section

cc: C. Lee Dupuis, Esq.
Clerk, United States District Court
for the Middle District of Louisiana

Ernest L. Johnson, Esq.
Johnson, Taylor & Thomas

Samuel Issacharoff, Esq.
Lawyers' Committee for Civil
Rights Under Law

Department of Justice
Washington, D.C. 20530

AUG 11 1976

Mr. Kenneth C. DeJean
Assistant Attorney General
Department of Justice
Post Office Box 44005
State Capitol
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to the changes affecting judicial districts by Act No. 46 and Act No. 47 of the 1976 Regular Session of the Louisiana Legislature, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965 as amended. Your submission was received on July 12, 1976. In accordance with your request, expedited consideration has been given this submission pursuant to the procedural guidelines for the administration of Section 5 (28 C.F.R. Section 51.22).

The Attorney General does not interpose any objection to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. We should further point out that the Attorney General has no authority to waive the 60-day period for considering a submission and, as our guidelines indicate (see 28 C.F.R. Section 51.22), we may re-examine our position on your submission should we receive additional information concerning the changes in voting procedure prior to

the expiration of the 60-day period. Should such information warrant a change in the Attorney General's determination, you will be so advised.

Sincerely,

/s/ J. Stanley Pottinger
J. Stanley Pottinger
Assistant Attorney General
Civil Rights Division

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 50530

SEAL

DSD:DHH:ELG:gml
DJ 166-012-3
A7300

Mr. Kenneth DeJean
Assistant Attorney General
State of Louisiana
Department of Justice
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 39 of the 1978 Regular Session of the Legislature of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on July 26, 1978.

The Attorney General does not interpose any objection to the change in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change.

Sincerely,

DREW S. DAYS III
Assistant Attorney General
Civil Rights Division

By: /s/ Gerald W. Jones
GERALD W. JONES
Chief, Voting Section

SEAL

U.S. Department of Justice

WBR:CWG:TGL:dvs
DJ 166-012-3 Washington, D.C. 20530
G5606-5607
G7029-7030

Honorable William J. Guste, Jr.
Attorney General
State of Louisiana 2 DEC 1982
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. Attorney General:

This is in reference to Act No. 21 (1982), of the Regular Session of the Louisiana Legislature, which creates additional district court judgeships for Judicial District Nos. 1, 15, 18, 23 and 27, divides the 29th Judicial District so as to create the 40th Judicial District, provides for the election of a district attorney in the 40th Judicial District and provides for the January 15, 1983, special election to be held in that district in the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on October 5, 1982.

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

See the Procedures for the Administration of Section 5 (28 C.F.R. 51.48).

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Calvin Gabil
Gerald W. Jones
Chief, Voting Section

SEAL

WILLIAM J. GUSTE JR
ATTORNEY GENERAL

STATE OF LOUISIANA
DEPARTMENT OF JUSTICE
BATON ROUGE
70804

July 29, 1981

CERTIFIED – RETURN RECEIPT
REQUESTED – #P05 8840222

Mr. James P. Turner
Acting Assistant Attorney General
Civil Rights Division
Voting Rights Section
Department of Justice
Washington, D. C. 20530

RE: Submission of Act 3 of 1981 under
Section 5 of Voting Rights Act

Dear Mr. Turner:

The State of Louisiana, through its Attorney General, William J. Guste, Jr., hereby submits Act 3 of the Regular Session of the Louisiana Legislature of 1981, a duly certified copy of which is attached hereto.

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[1] Mr. James P. Turner, July 29, 1981, with sequential page numbers, i.e. two, three, four, five, and six have been omitted from this copy.

This Act is submitted pursuant to the Voting Rights Act of 1965, Section 5, and in accordance with 28 C.F.R., Part 51, as this Act effects changes with respect to voting in the State of Louisiana by amending and reenacting certain portions of the Louisiana Revised Statutes. Those sections are: R.S. 13:312, R.S. 13:312.1, R.S. 13:321, and R.S. 13:353.

Act 3 was originally introduced in the Louisiana Senate as Senate Bill 170. The purpose of the bill is to assist in facilitating changes in appellate jurisdiction of the Louisiana Supreme Court and the Louisiana Circuit Courts of Appeal. Prior to 1980, the Louisiana Courts of Appeal had no criminal jurisdiction. However, by reason of Act 843 of 1980, approved by the Louisiana electorate on November 4, 1980, as an amendment to the Louisiana Constitution, effective July 1, 1982 appellate jurisdiction in criminal matters will be vested in the Louisiana Courts of Appeal. With the change in the appellate jurisdiction of the Courts of Appeal, the Legislature recognized the need for additional judgeships to handle the additional criminal appeal workload that these courts will assume and accordingly, Act 3 made the following changes:

New law, relative to the courts of appeal, basically provides for the creation of a Fifth Circuit, out of the present Fourth Circuit, and also increases the number of appellate judges from 33 to *48* throughout the state.

New law creates the court of appeals for the Fifth Circuit out of the present Fourth Circuit. The chart below shows the number of judges and arrangement of districts in the prior law, Act 661 of 1980, and the new law to wit:

	PRIOR LAW		ACT 661, 1980 R.S.		NEW LAW	
1.	First Circuit					
	Districts	Judges	Districts	Judges	Districts	Judges
1st -	Ascension, Assumption, Iberville, Lafourche, Pointe Coupe, St. Mary, Terrebonne, and West Baton Rouge	3	1st - (Same)	3	1st - (Same)	4
2nd -	East Baton Rouge	3	2nd - (Same)	3	2nd - (Same)	4
3rd -	East Feliciana, Livingston, St. Helena, St. Tammany, Tangipahoa, Washington, and West Feliciana	3	3rd - (same) At Large	3 1	3rd - (Same)	4
Total		9	Total	10	Total	12

	PRIOR LAW		ACT 661, 1980 R.S.		NEW LAW	
2.	Second Circuit					
	Districts					
1st -	East Carroll, Franklin, Madison, Morehouse, Ouachita, Richland, Tensas, and West Carroll	1	1st - (Same)	1	1st - (Same)	2
2nd -	Bienville, Bossier, Caldwell, Claiborne, Jackson, Lincoln, Union, Webster, and Winn	1	2nd - (Same)	1	2nd - (Same)	2
3rd -	Caddo, DeSoto, and Red River	1	3rd - (Same)	1	3rd - (Same)	2
At Large		2	At Large	3	At Large	1
Total		5	Total	6	Total	7

	PRIOR LAW	ACT 661, 1980 R.S.	NEW LAW
3.	Third Circuit (No Change by new law)		
	Districts		
1st -	Avoyelles, Catahoula, Concordia, Grant, LaSalle, Natchitoches, Rapides, and Sabine 2	1st - (Same) 2	1st - (Same) 2
2nd -	Allen, Beauregard, Calcasieu, Cameron, Jefferson Davis, and Vernon 2	2nd - (Same) 2	2nd - (Same) 2
3rd -	Acadia, Evangeline, Iberia, Lafayette, St. Martin, St. Landry, and Vermilion 2	3rd - (Same) 2	3rd - (Same) 2
At Large	 3	At Large 3	At Large 3
Total	 9	Total 9	Total 9

App. 12

	PRIOR LAW	ACT 661, 1980 R.S.	NEW LAW
4.	Fourth Circuit		
	Districts		
1st -	Jefferson 2	1st - Orleans 8	1st - Orleans 8
2nd -	Orleans 5	2nd - Plaquemines.. 1	2nd - Plaquemines.. 1
3rd -	St. Charles, St. James, St. John the Baptist 1	3rd - St. Bernard ... 1	3rd - St. Bernard ... 1
4th -	Plaquemines and St. Bernard... 1		
From combined 1st, 3rd, and 4th districts	 1		
Total	10	Total 10	Total 12

App. 13

PRIOR LAW		ACT 661, 1980 R.S.	NEW LAW	
5.	Fifth Circuit (New)			
	1st - Jefferson	1	1st - (Same)	6 (7)
	2nd - St. James, St. John the Baptist (east of the Mississippi)	1	2nd - (Same)	1
	3rd - St. Charles, St. John the Baptist (west of the Mississippi)	1	3rd - (Same)	1
	Total	6	Total	8 (9)
	TOTAL	41	TOTAL	48 (49)
	TOTAL	33	TOTAL	48 (49)

An additional judge for the first district exists until January 1, 1983.

Act 661 of 1980 would create the additional judgeships shown on the chart effective December 1, 1981.

New law repeals the above digested provisions of Act 661 which are to be effective December 1, 1981, except that it retains the provisions of Act 661 which created one additional judgeship for the Fourth Circuit. That judgeship has been filled. (Effective on signature of the governor).

Prior law provided that a sheriff's deputy shall attend each session of court for the First, Second, and Third Circuits. The Fourth Circuit is attended by the New Orleans police. *New law* adds sheriffs' deputies for the Fifth Circuit. (Effective May 1, 1982).

New law provides that all additional judgeships shall be established as soon as this Act is signed by the governor. Provides for a special election by special primary on the third Saturday in October and special general election on the sixth Saturday following the third Saturday in October. The new judges for the First, Second, and Fourth Circuit take office on January 1, 1982; the judges for the Fifth Circuit take office May 1, 1982. The new judges for the "new" Fourth Circuit will be elected to districts of the "old" Fourth Circuit, take office on January 1, 1982, and be transferred to the "new" Fourth Circuit on May 1, 1982.

Provides that nine judgeships shall be established for the Fifth Circuit until January 1, 1983. Provides that seven of the judges shall be elected from the first district of the Fifth Circuit. Provides that one judgeship from the first district shall be abolished on January 1, 1983 (when the

incumbent judge's term expires). Provides that four of the nine judges are incumbent judges, the remaining five additional judges shall be selected as follows: one from the third district, and four from the first district of the Fifth Circuit.

Prior law provided for alphabetical divisions (A, B, C, ...) within each district of the First Circuit. *New law* provides the same for all court of appeal circuits. (Effective on the signature of the governor).

Effective dates
(a) On Act's signature by governor – establishment of all judgeships.
(b) May 1, 1982 – creation of the Fifth Circuit.
(c) On signature of the governor – all other provisions.

Act 3 was adopted by the Louisiana Legislature pursuant to its general legislative powers provided in Article III, Section 1 of the Louisiana Constitution of 1974 and the Constitution of the United States of America, Amendment X.

Act 3 was finally passed by the Legislature on May 27, 1981, when the Louisiana Senate concurred in House amendments by a vote of 33-0. The House of Representatives had previously adopted the bill by a vote of 77-1 on May 2, 1981. The Act was signed by Governor David C. Treen on June 2, 1981.

Section 13 of the Act provides with respect to the effective date of the various sections of Act 3. In accordance with the mandate of Act 3, Governor Treen has issued an Executive Proclamation calling for elections to fill the newly created judgeships which are scheduled to

be conducted on October 17, 1981 and November 28, 1981 for the primary and general elections, respectively. A copy of this proclamation is enclosed. Due to these impending elections, the State of Louisiana requests expedited consideration.

The Act will be effective with respect to only those portions of the State of Louisiana where additional Court of Appeal judgeships have been created, and it is not anticipated that the Act will affect adversely any language or racial minority group.

An action entitled *Elmer Tapper v. David C. Treen, Governor of Louisiana,* was filed in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, relative to the implementation of Act 3. A copy of the Plaintiff's petition is included, although Mr. Trapper has voluntarily dismissed his petition as of July 22, 1981. The prior practices were precleared by the United States Attorney General in a letter dated August 28, 1980, a copy of which is attached hereto.

Requests for further information should be directed to the undersigned, Kenneth C. DeJean, Assistant Attorney General, Post Office Box 44005, Baton Rouge, Louisiana 70804, telephone: (504) 342-7013.

Sincerely,

WILLIAM J. GUSTE, JR.
Attorney General

BY: /s/ Kenneth C. DeJean
KENNETH C. DEJEAN
Assistant Attorney General

KCD:lg
Enclosures (4)

SEAL
WBR:CWG:TGL:gml
DJ 166-012-3 *Washington, D.C. 20530*
D9992-9993

Kenneth C. DeJean, Esq.
Assistant Attorney General
State of Louisiana Aug 26, 1981
Department of Justice
P.O. Box 44005
Baton Rouge, Louisiana 70804

Dear Mr. DeJean:

This is in reference to Act No. 3 of the 1981 Regular Session of the Louisiana Legislature, which provides additional appellate court judges and a special election in October 1981, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Your submission was received on August 4, 1981. In accordance with your request expedited consideration has been given this submission pursuant to Section 51.32 of the Procedures for the Administration of Section 5 (46 Fed. Reg. 877).

The Attorney General does not interpose any objections to the changes in question. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the

Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Calvin Gabil
Gerald W. Jones
Chief, Voting Section

SEAL

U.S. Department of Justice
Civil Rights Division

Office of the Assistant Attorney General
Washington, D.C. 20530

Cynthia Y. Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Nov. 20, 1990

Dear Ms. Rougeou:

This refers to the September 23, 1988, objection, under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c, to Act 515 (1974), which creates an additional judgeship (Division B) and provides for a special election therefor in the 6th Judicial District of the State of Louisiana.

As you know, on September 17, 1990, the Attorney General declined to withdraw the objection, based on the information that was then available. Since that time, we have received and carefully reviewed additional factual information relevant to the creation and implementation of the Division B judgeship position. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.46). More specifically, our analysis of the October 6, 1990, election returns has led us to further reconsider our determination with regard to the 6th Judicial District, and, based on that reconsideration we are satisfied that the concerns we previously entertained no longer prevail in that district. Accordingly, the objection interposed September 23, 1988, and continued September 17, 1990, to the specified changes under Act 515 (1974) is hereby withdrawn. See 28 C.F.R. 51.48 and 51.55. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act

expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such changes. 28 C.F.R. 51.41.

Because this matter remains pending before the court in *Clark v. Roemer*, No. 86-435-A (M.D. La.), we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
John R. Dunne
Assistant Attorney General
Civil Rights Division

cc: Honorable John V. Parker
Chief Judge, United States District Court

Michael M. Rubin, Esq.
Fred J. Cassibry, Esq.
Robert G. Pugh, Esq.
Kenneth C. DeJean, Esq.
John N. Kennedy, Esq.
Jack C. Benjamin, Esq.
George A. Blair, III, Esq.
Anthony Skidmore, Esq.
Robert P. McLeod, Esq.
Harry Rosenberg, Esq.
Ernest L. Johnson, Esq.
Robert B. McDuff, Esq.
Ulysses Gene Thibodeaux, Esq.

ACT 515

Regular Session, 1974

SENATE BILL NO. 202

BY MR. C. M. BROWN

ORIGINATED

IN THE

SENATE

/s/ Charles Wm. Roberts
SECRETARY OF THE
SENATE

Rec'd by the Governor
July 11, 1974 at 11:45 PM
D. Davenport

Received by Secretary of State
the 13th day of July, 1974
/s/ Wade O. Martin, Jr.
Secretary of State

Certified by the Governor as
Emergency Legislation.

H 7/9/74, S 7/9/74
date

Wade O. Martin, Jr.
Secretary of State

AN ACT

To amend and reenact Sections 621.5, 621.9 and 621.32 of Title 13 of the Louisiana Revised Statutes of 1950, relative to the number of judges in

the Sixth, Ninth and Thirty-Second Judicial Districts, to create an additional office of district judge for each of said judicial districts; to provide for the qualifications, election, term of office, compensation and expenses of said additional judges, including the election of the initial judges; and otherwise to provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Sections 621.6, 621.9 and 621.32 of Title 13 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted to read as follows:

§ 621.6. Sixth judicial district

The sixth judicial district court shall have two judges.

* * *

§ 621.9. Ninth Judicial District

The Ninth Judicial District Court shall have five judges.

* * *

§ 621.32. Thirty-Second judicial district

The thirty-second judicial district shall have four judges.

Section 2. For purposes of nomination and election only there is created in the sixth judicial district two divisions, to be designated as Division A and Division B. Division A shall be occupied by the present judge of the sixth judicial district court and his successors in office, and Division B shall be occupied by the first person to

serve as judge of the herein newly created judgeship and his successors in office.

Section 3. There is created in the thirty-second judicial district one new division, to be known as Division O. The divisions of the thirty-second judicial district which are already existing on the effective date of this Act shall be occupied by the present judges and their successors in office and Division O shall be occupied by the first person elected to serve as judge of the herein newly created judgeship and his successors in office. The creation of this division is for the purpose of nomination and election only.

Section 4. The additional judges provided for by this Act for the sixth and thirty-second judicial districts shall have the same qualifications and shall be elected at the same time and in the same manner, shall serve the same term of office and shall be entitled to the same compensation and expenses, payable from the same sources, as is now or may hereafter by provided for the other judges of the sixth and thirty-second judicial districts.

The first occupant of the additional judgeship provided for by this Act shall be elected at a special election which shall be called by the governor for the first term, and the judge so elected shall serve a term to expire at the same time as the term of the other judge of the sixth judicial district.

The first judge to fill the additional judgeship of the thirty-second judicial district herein created shall be elected at a special election to be called by the governor to be held at the same time as the congressional elections in 1974.

Section 5. There is created in the Ninth Judicial District one new division, to be known as Division E. The divisions of the Ninth Judicial District which are already existing on the effective date of this Act shall be occupied by the present judges and their successors in office. Division E shall be occupied by the first person elected to serve as judge of the herein newly created judgeship and his successors in office. The creation of this division is for the purpose of nomination and election only.

Section 6. The additional judge provided for by this Act shall have the same qualifications and shall be entitled to the same compensation and expenses, payable from the same sources as is now or may hereafter be provided for the other judges of the Ninth Judicial District Court, and shall be elected by the qualified voters of the said judicial district at a special election to be called by the governor to be held on the first Tuesday after the first Monday in November, 1974, for a term ending with the term of the present district judges in said judicial district, and thereafter the said judge shall be elected at the same time and in the same manner and shall serve the same term of office, as is now or may hereafter be provided for the other judges of the Ninth Judicial District Court.

Section 7. The legislature has knowledge of the fact that more than one bill has been introduced and/or passed at this 1974 Regular Session, each of which increases the number of district judges, and the legislature hereby declares its intent that each such bill enacted at this session creating any new judgeship in a judicial district is not intended to repeal or conflict with another bill enacted at this session creating any judgeship in another

district, and that it is the intent of the legislature that any such bills enacted at this session, whether enacted prior to or after the enactment of this Senate Bill No. 202, shall be construed in harmony to give each bill effect in the judicial district in which it increases the number of judges.

Section 8. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby decalred (sic) severable.

Section 9. All laws or parts of laws in conflict herewith are hereby repealed.

/s/ James E. Fitzmorris, Jr.
LIEUTENANT GOVERNOR
AND PRESIDENT OF THE
SENATE

/s/ E.L. Henry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

/s/ Edwin Edwards
GOVERNOR OF THE STATE
OF LOUISIANA

APPROVED: July 12, 1974

E at 3:15PM